
(1940) 08 CAL CK 0003

In the Calcutta High Court

Case No : Appeal from Appellate Decree No.71 of 1940

Probodh Kumar Das

APPELLANT

Vs

Dantmara Tea Company, Ltd.

RESPONDENT

Date of Decision : 20-08-1940

Acts Referred:

Citation : (1940) 08 CAL CK 0003

Final Decision : Dismissed

Judgement

Mitter, J.—The properties in suit, a tea garden, which lie in two divisions, the Kaiya and the Doloo division, belonged to the Kaiyacherra Tea Co. Ltd. Messrs Gillanders Arbuthnot & Co. were the mortgagees in possession under a mortgage dated the 21st December, 1923. The said Company, namely Kaiyacherra Tea Co., Ltd. went into liquidation. At a sale held by the liquidators under the orders of Court, Gillanders Arbuthnot & Co. purchased the properties on the 27th February, 1931, free from incumbrances, but no conveyance was executed in their favour by the liquidators. By exchange of letters between Gillanders Arbuthnot & Co., hereafter called the Company, and one Santinidhan Roy, a contract for sale was concluded on the 10th October, 1931, by which the former agreed to sell to the latter the properties in suit. The terms of the contract are recited in Roy's letter to the Company dated the 8th October, 1931. They are set out in the plaint at pages 51 and 52 of Book A, Part I. Rs. 85,000 was fixed as the price, which was to be paid in four instalments,—Rs. 15,000 on the date of delivery of possession, Rs. 10,000 before the 31st January, 1932, and the balance of Rs. 60,000 in three equal annual instalments on or before the 31st October of the years 1932, 1933 and 1934. Possession was to be delivered on or about the 16th October, 1931 on payment of the first instalments of Rs. 15,000, and on its payment the Company was to execute a conveyance in favour of Roy or his nominee, reciting the receipt of the price in full though in fact Rs. 15,000 only might have been paid. For the balance of the price, namely Rs. 70,000 provision was made in paragraph 3 of the letter, with which we will deal later on. Roy paid the first instalments of Rs. 15,000 and was put in possession by the Company on the 21st October, 1931.

He paid a further sum of Rs. 2,000 on the 27th January, 1932. This sum of Rs. 17,000 is all that the Company has received from Roy. He has not paid anything more, nor have the persons who claim interest in the properties from him. No conveyance has been executed by the Company in favour of Roy or his nominee. The Appellant Probodh Kumar Das who is Defendant No. 2 in the suit claims to have derived an interest from Roy under an agreement in half of the properties, namely, in the lands of the Kaiya division and in half of the factory, described respectively in Schedules C and D annexed to the plaint. Although Roy had no title vested in him, the Company not having executed the conveyance, he transferred the Doloo Division and half share in the factory to the Bhowanipore Banking Corporation, Ltd. (Defendant No. 7) who in turn made a transfer to the Chandranagar Tea Co., Ltd. (Defendant No. 4). Fateh Chand Dhariwal (Defendant No. 6) purchased at an execution sale the "right, title and interest" of Roy, in some of the plots included in the plaint. R.K. Roy & Co., Ltd. (Defendant No. 2) was a transferee from Das, but it is admitted that that Company has no interest, the transfer in its favour by Dass being fictitious. Rai Bahadur Upendra Lal Roy (Defendant No. 5) was appointed receiver in a suit for partition in respect of some of the properties in suit instituted by the Chandranagar Tea Co., Ltd. against Das. The Plaintiff, the Dantmara Tea Co., Ltd. derives its title, to the properties in suit under two registered conveyances executed in its favour by Messrs. Gillanders Arbuthnot & Co. and the liquidators of the Kaiyacherra Tea Co., Ltd. on the 1st June, 1934. The said Company has accordingly legal title to the properties. In 1934, after the said conveyances, Probodh Kumar Dass and Messrs. R.K. Roy & Co. instituted a suit for these properties against the Dantmara Tea Co., Ltd., Messrs. Gillanders Arbuthnot & Co., the Bhowanipore Banking Corporation, Ltd., the Chandranagar Tea Co., Ltd., Chandmull Bhatia and others. Chandmull Bhatia was made a Defendant on the allegation that he had purchased from the Bhowanipur Banking Corporation, using the name of the Chandranagar Tea Co., Ltd. The suit was (1) for a declaration that neither Gillanders Arbuthnot & Co. nor the Dantmara Tea Co., Ltd., nor Chandmull Bhatia, had any title, and so were not entitled to enforce any rights in respect of the Kaiyacherra Tea Estate, or to claim any interest in the export quota rights allotted by the Tea Licensing Committee in respect of that estate; (2) for a perpetual injunction on them, restraining them from claiming export quota rights and for other reliefs not necessary to be detailed here. That suit succeeded in the first Court, but was dismissed by this Court [Dantmara Tea Co. v. Probodh Kumar Das 41 C.W.N. 54 (1936)]. The judgment of this Court was affirmed by the Judicial Committee of the Privy Council [Probodh Kumar Das v. Dantmara Tea Co. L.R. 68 I.A. 293; s.c. 44 C.W.N. 145 (1939)]. The Plaintiffs in that suit relied upon sec. 53A of the Transfer of Property Act in support of their case but it was held that that section only conferred a passive equity which would only enable a Defendant who had no title to resist a suit for possession, if his case fell within the section, but did not enable a Plaintiff who has no registered conveyance in his favour to succeed in his suit. Whether Probodh Kumar Dass had such a passive equity or not was not decided in that case as that question was not

relevant in that suit. Whether he has such an equity is one of the material questions in this appeal.

2. We have already recited some of the terms of the contract. Paragraph 5 thereof entitled Roy to have a conveyance on payment of the first instalments, as soon as the solicitors of the Company could arrange. A conveyance from the liquidators had to be arranged before the Company could execute a conveyance in favour of Roy. We accept the contention of the Appellant that the parties thought that the conveyance could be executed before the 31st January, 1982, i.e., before the second instalments of the price fell due. On the execution of the conveyance the title of the purchaser was to date back from the 10th October, 1931, the date of the contract. Paragraph 3 made provision for the balance of the price namely Rs. 70,000. It provided that Roy was to execute a promissory note for the said amount and in default of the punctual payment of the instalments of the price as provided for in paragraph 2, the Company would be at liberty "to enforce payment of the said promissory note for the whole amount then outstanding." The balance of the price was to be "further secured by way of equitable mortgage by deposit of title deeds or by a legal mortgage" whichever was desired by the Company. On the interpretation of this paragraph and paragraph 5 depends the question as to whether the Appellant can resist the Plaintiff's claim for possession. The contention of the Appellant is that by reason of those paragraphs the consideration for the contract for sale was not the payment of Rs. 85,000 in cash but the payment of Rs. 15,000 in cash and the execution of a promissory note by Roy for the sum of Rs. 70,000. We cannot accept this contention. Under this contract Roy had to pay Rs. 85,000 in fulfillment of his part of the contract. The promissory note for Rs. 70,000 was not intended to be a substitute for cash payment, but was only to be a security for the balance of Rs. 70,000 and was to be the only security before the conveyance was executed. After the execution of the conveyance the balance of the price was to be "further secured" by Roy executing a mortgage of the property sold. This is the interpretation that we put upon paragraph 3 of the contract. Neither Roy nor the Appellant can resist the Plaintiff's claim for possession, as they have not offered to pay the balance of Rs. 68,000 which still remains unpaid. In both their written statements they have taken the definite position that they are not bound to pay any more money to the Company or its assigns than the sum of Rs. 15,000 already paid, and that Roy had fully performed his part of the contract by paying the said sum of Rs. 15,000 to the Company on the 16th October, 1931, and by executing the promissory note for Rs. 70,000 in its favour. As neither Roy nor Dass has, in the view that we take of the contract, performed their part of the contract (that is, paid the Company the full amount, Rs. 85,000) and as neither of them has expressed their willingness to pay the balance (Rs. 68,000) at any time,--on the contrary they have resisted payment--we hold that they have not the passive equity as defined in sec. 53A of the Transfer of Property Act. This is the conclusion we have arrived at. We will now summarise the material facts and record our findings thereon.

3. After delivering possession the Company sent to Roy for his approval the draft conveyance and the draft mortgage on the 23rd December, 1931, [Ex. 20 (a) B. 7]. Roy did nothing with the result that the Company sent him a reminder on the 22nd January, 1932, in which it asked him to approve the drafts and return them without delay as the Company wished the execution of the said documents within the said month [Ex. 20 (b)--B. 10]. Nothing was done by Roy. He had no excuse then in delaying matters, for the dispute regarding the stock of tea which Roy claimed to have been sold to him with the properties had been settled on the 20th January, 1932 (Ex. 21, B-8). He had enough time to approve the drafts and if he had acted promptly in returning the drafts, the conveyance of the property would have been completed by the 31st January, 1932, and the Company would have been placed in a more secured position, for in that case it would have had a mortgage over the properties for the balance of the price, namely Rs. 68,000. On the 22nd January, 1932, the Company reminded Roy that the second instalments would fall due on the 31st January, 1932, and asked him to make arrangement to pay the same. Roy paid Rs. 2,000 only on the 27th January, 1932, pleaded for time to pay the balance but ultimately failed to pay the same and the subsequent instalments. Dass who had guaranteed payment of the balance of the price was called upon by the Company in the first instance to pay the balance (Rs. 8,000) of the second instalments and ultimately the whole balance (Rs. 68,000) of the price. These demands were made on the 1st and 12th February, 1932, respectively. The Company thereafter recovered a decree against Roy on the promissory note and another decree against Dass as guarantor. Dass preferred an appeal against that decree and succeeded in the appeal. The appeal Court held that the Company was guilty of breach of contract by not executing the conveyance in favour of Roy, and the contract, the performance of which Dass had guaranteed, had been varied by an agreement between Roy and the Company, without the concurrence of Dass. In this view the appeal Court held that Dass had been discharged from his guarantee and dismissed the Company's suit against him (Ex. V--A 25--II). Dass thus escaped from his guarantee and nothing further has been realised by the Company from Roy. The plea of adjustment of the decree obtained by the Company against Roy which has been set up in the written statement of Roy, and, though not in an intelligible manner, in the written statement of Dass, has not been substantiated--there being no evidence in support of that plea. Roy returned the draft mortgage later on but the draft conveyance sent to him by the Company as far back as the 23rd December, 1931, has not been returned by Roy, yet, who, so to say, has slipped out of the picture after having parted with his interest to others. We cannot agree with the view expressed in the judgment of the appeal Court (Ex. V) that the Company was responsible for the non-execution of the conveyance in favour of Roy, and was accordingly guilty of breach. That finding is not *res judicata*, as Roy was not a party to that suit and Dass was litigating under a different title, though the Company can be regarded as the predecessor-in-interest of the Dantmara Tea Co. as the former has also transferred to the latter all its rights including the benefit of the contract.

4. While the said suit by the Company against Dass was pending and also at the Appellate stage of that suit Dass started negotiations. He proposed to buy the property from the Company as also its rights under the decree obtained against Roy at a lesser sum. In one of the letters he wrote to the Company he clearly indicated that Roy was not a man of substance and had no means to pay the balance of the price for which the Company had obtained a decree against him. (Ex. C 4--C 19). In two other letters which he wrote to the Company he indicated his own financial position. He stated that he had no money and that his enemies had destroyed his credit, so he was placed in difficulty in raising money in order to fulfil the terms of the new contract for sale which the Company had entered with him on his entreaties (Ex. C 10--C 30; Ex. C 12--C 33). In these circumstances it is not surprising to find that both Roy and Dass have taken up the position that they are not under the obligation to pay the balance of the price to the Company or its assignee, the Plaintiff, and that Dass and the other assignees of Roy are entitled to remain in possession without making any payment. To us it seems that this is an intolerable position. Sec. 53A gives the right to the transferee-Defendant to resist the transferor-Plaintiff's claim for possession only when he has himself performed his part of the contract, or where performance on his part was still due, that he should offer to perform what remained to be performed by him. We have already held that under the contract for sale Roy was required to pay Rs. 85,000, the promissory note by him being only a security for the balance of the price namely Rs. 70,000. He has not done so and has not made any offer to pay the same. If he had made the offer a conditional decree could have been passed in favour of the Plaintiff. Even if the word "transferee" used in paragraph 3 of sec. 53A includes his assignees, Dass cannot succeed in resisting possession for the self-same reasons. We accordingly hold that sec. 53A is not available to Dass.

5. Two other points were raised before us by the Appellant's Advocate. He says that Roy acquired an equitable title by reason of the payment of Rs. 15,000 to the Company and by reason of his possession. The Company thereafter, according to him, became Roy's trustees. It could not therefore pass a valid title to the Plaintiff, in any event, says he, the Plaintiff having taken with notice of that equitable title cannot claim the property from Roy and his assignees. We fail to appreciate this argument. It must now be taken to be well established that in India there is no such thing as equitable title. Title to immovable property can only be transferred in the manner provided for in the Transfer of Property Act read with the Indian Registration Act. In India a person can acquire title to immovable property valued at over Rs. 100 only through a registered conveyance [Ariff v. Jadunath L.R. 58 I.A. 91 : s.c. 35 C.W.N. 550 (1931), Currimbhoy v. Creet L.R. 60 I.A. 297 : s.c. 37 C.W.N. 265 (1932) and Pir Buksh v. Mohamed Tahar L.R. 61 I.A. 388 : s.c. 39 C.W.N. 84 (1934)]. Sec. 53A introduced in the Transfer of Property Act by Amending Act XX of 1929 has not changed the law in this respect, but has only recognised in a limited manner the English doctrine of part performance and has enabled the transferee to raise a defence, which was

not available to him before the said amending Act was passed.

6. The last point that has been urged by the Appellant is that the Plaintiff cannot get possession of the movables which are not attached to or embedded in the earth. His case is that title to those movables passed to Roy by mere delivery. We cannot accept this contention. The intention of the parties to the contract must be determining factor (sec. 19 of the Indian Sale of Goods Act, III of 1930), There was one contract for sale by which the Company agreed to sell the tea estate as one concern. The contract expressly stated that a conveyance was to be executed. The intention, therefore, was that title was to pass not on the delivery contemplated about the 16th October, 1931, but at a future time when the conveyance would be executed. We accordingly overrule all these points also. The result is that the appeal is dismissed with costs to the Plaintiff Respondent. To make the position clear we should notice the fact that when the appeal was opened Dr. Basak appearing for the Plaintiff Respondent took objection to the valuation of the appeal. Mr. Sen appearing for the Appellant met that objection by stating that the Appellant had confined his claim to the Kaiya Division and to half of the properties described in Schedule D annexed to the plaint and that he has abandoned his claim to the Doloo Division and the other half of the properties described in Schedule D annexed to the plaint. We record the said admission of the Appellant's Advocate.

Biswas, J.

I agree.